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In the Supreme Court of the United States.

OCTOBER TERM, 1967.

No. 1155.

STATE STREET BANK AND TRUST COMPANY,
Petitioner,

v.

BANCO ESPANOL DE CREDITO,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Counter-Statement of Case.

Respondent objects to the statement of the case and the statement of questions presented in the petition for a writ of certiorari insofar as the petition states or implies that in rendering its decision the Court of Appeals departed from traditional principles of commercial law. The Court of Appeals in fact followed established principles, although in relation to unusual documents. In the course of its argument showing why there need be no further review of this case, respondent will correct the erroneous statements of petitioner concerning these matters.

Argument.

Within the meaning of Rule 19 of the Rules of this Court there are no reasons, special, important or otherwise, why

the decision of the Court of Appeals for the First Circuit in this case should be reviewed.

The record presents no question of general commercial interest. This case stands by itself. As stated in the petition for certiorari, the documents involved are "specific and unusual documents." (Footnote to p. 3 of petition).

The petition states that this case is of great importance because an international financial transaction is involved. (Petition, p. 11). This statement rests on the erroneous premise that the decision of the Court of Appeals in this case bears some significant relation to the letter of credit in the ordinary transaction. In fact, no such relation exists. The documents in this case were unique, and the significance of the case is limited to its facts. Within the memory of a senior official the State Street Bank and Trust Company has never issued letters of credit like the two in the case at bar, and there is no reason to suppose that any like them will be issued again.

An official of the petitioner testified that since coming to petitioner's foreign department in the year 1929 he had reviewed some 60,000 or 70,000 letters of credit and that he had never before seen any like the two letters of credit issued by petitioner in the case at bar. (R. 57-58). This testimony is printed in the appendix hereto.

In the trial court counsel for the petitioner said that the terms of the letters of credit issued by petitioner were "very unusual." (R. 59).

A further review of these unusual documents will add nothing significant to the jurisprudence.

On the merits, moreover, the decision of the Court of Appeals applied the right legal principles and was a correct decision.

In arriving at its decision with respect to the clumsily drafted letters of credit issued by petitioner in this case

the Court of Appeals applied doctrines of commercial law which are traditional and which have recently been codified in the Uniform Commercial Code.

The petition states in a number of places that the Court of Appeals departed from the traditional principle that the issuer of a letter of credit is a dealer in documents. (Petition, pp. 5, 12, 14, 17-20). This is not a correct statement. The opinion of the court below specifically referred to Section 5-114(1) of the Uniform Commercial Code, which is as follows:

> "An issuer must honor a draft or demand for payment which complies with the terms of the relevant credit regardless of whether the goods or documents conform to the underlying contract for sale or other contract between the customer and the beneficiary." (Petition, p. 33).

The opinion went on to note that the Uniform Commercial Code "simply codifies long-standing decisional law." (Petition, p. 34). The court said:

> "We take as a starting point the substantial body of case law which establishes and supports the general rule that documents submitted incident to a letter of credit are to be strictly construed." (Petition, p. 34).

These quotations show that the Court of Appeals was applying the basic legal principles traditionally applicable to letters of credit.

The difficulty from which arose the dispute adjudicated by the Court of Appeals was created by the letters of credit issued by the petitioner. The initial letters of credit embodied two sources of confusion. First of all, at the outset and over the objection expressed to its customer, the State Street Bank and Trust Company issued letters of credit

calling for "an inspection certificate," without designating any inspector or specifying any standard of inspection; this omission left a "hazardous gap" which required a delay of 3½ months to resolve. (Petition, pp. 28-29). An amendment to the letters of credit finally named an inspector, but established as a standard that the goods be "in conformity with the order." (Petition, p. 29). This was a second source of confusion, and it was this feature of the letters of credit which petitioner's own official had not seen in any of the prior 60,000 to 70,000 letters of credit which he had examined during his career. (R. 57-58).

The letters of credit in the case at bar fell short of the requirement mentioned in the footnote on page 17 of the petition for certiorari to the effect that the terms of such a letter should be "sharply defined." As stated by the Court of Appeals:

> "Identification of the underlying orders to which the letters of credit referred is not an easy task." (Petition, p. 30).

The confusion was the fault of petitioner State Street Bank and Trust Company. Contrary to explicit statements in the petition (page 10; footnote 25 on page 16) to the effect that the State Street had never seen the relevant "orders" and superseding "stock sheets," the State Street had these very papers in its file. (Ex. 3; R. 89, 93-95, 97-98). The State Street could have attached copies of these papers to its amended letters of credit or could otherwise have quoted or identified without ambiguity the specific provisions that were involved. It did not do so.

The Court of Appeals looked to evidence of facts bearing upon the meaning of the documents involved and showing the extent to which the State Street Bank and Trust Company had knowledge of such matters. Upon these facts the

Court of Appeals held (1) that the designated inspector acted correctly in construing the meaning of the letter of credit in relation to the papers labeled "order" and "stock sheets" that were placed before it (petition, p. 40); (2) that in the absence of instructions in the letter of credit the inspector had adopted an acceptable inspection procedure (petition, p. 38); (3) that the inspector correctly ignored a barrage of contradictory cablegrams from the disaffected buyer in the United States (petition, p. 38); (4) that the "reserves" referred to in the inspection certificate referred, as the inspection certificate expressly stated, not to the goods, but merely to the underlying dispute reflected in the barrage of cablegrams (petition, p. 41); and (5) that certain semantic problems arising in translation were without significance (petition, pp. 39-40).

The concluding portion of the reasoning of the Court of Appeals is in precise accordance with the traditional principles of commercial law with respect to letters of credit. The Court of Appeals said:

> "We hold, therefore, that the inspection certificate in this case conformed in all significant respects to the requirements of the letter of credit." (Petition, p. 41).

Thus the "specific and unusual documents" referred to in the petition itself (p. 3) were interpreted, and the resulting dispute decided, by the application of traditional legal principles.

It should be noted in closing that the broad arguments of public policy set forth at pages 17 through 20 of the petition fall wide of the mark in this case. The argument addressed to public policy suggests, for example, that before paying on a letter of credit an issuing bank will henceforth be obliged to make its decision "at prohibitive cost, under an unmeetable deadline, at the risk of complex liti-

gation . . ." (Petition, pp. 18-19). This rhetoric has no place in the case at bar, in which the refusal of the State Street Bank and Trust Company to honor the letters of credit was made upon the "instructions" of the Bank's customer and upon confirmation of an indemnification agreement made several weeks before. (PX. 6; R. 111). The earlier indemnification agreement by the customer was—

> "to undertake the defense of any suit that might be brought in the United States as a result of such refusal and we agree further to indemnify you for any loss, cost or damage which you may suffer which is referrable to such litigation." (PX. 7; R. 112-113).

Thus the State Street Bank and Trust Company is in this case not as a bank but as a nominee. It has not suffered any harm from being a bank. It is bringing the instant petition, as a service or in connection with a loan arrangement (R. 68), to assist its customer in refusing to pay for goods. Petitioner is therefore without standing in this case to complain of any supposed hardship which a banker might think he saw in the decision below.

No judgment has yet been entered in accordance with the mandate of the Court of Appeals calling upon the District Court to decide whether there are to be further proceedings or whether the absence of argument in the Court of Appeals with respect to "additional defenses" claimed by petitioner is to be charged to petitioner so that judgment shall be entered for respondent forthwith. This Court may consider the absence of a final judgment below as one additional reason why this Court should not exercise its discretion to review the unique situation presented in this case.

Conclusion.

For the above reasons the respondent asks that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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[Appendix follows.]

Appendix.

[39] ROBERT D. NORTON, Sworn

Direct Examination by Mr. Choate

Q. What is your name? A. Robert D. Norton.

Q. Where do you live? A. No. 83 Prescott Street, Reading, Massachusetts.

Q. You are employed by the State Street Bank and Trust Company? A. I am.

Q. In what capacity? A. I am an assistant vice-president assigned to the international department.

Q. How long have you held that position? A. Since 1955.

Q. How long have you been in the international department? A. I was originally employed by one of the predecessor institutions, the Second National Bank of Boston, in 1927, and I was assigned to the foreign department of that institution in 1929.

Q. From your employment in the foreign department of the predecessor bank and the State Street Bank and Trust Company, have you had occasion, during those years, to deal with letters of credit? [40] A. I have.

Q. About how many letters of credit would you say you deal with in the course of a year, or have dealt with in the course of a year? A. In the area of 1,500 or 2,000.

* * * * * * * * *

Q. Is the requirement for the inspection certificate that appears in the amendments of the letters of credit, in this case that the goods are in conformity with the order, is that the usual form of the requirement of an inspection certificate, in your practice in the bank? A. In my experience, it is not.

Q. What is the usual form of the requirement of an inspection certificate? A. In our experience frequently there is no further definition other than naming the individual or party who would issue the inspection certificate. Occasionally it might be further defined indicating that the inspection certificate must certify that the goods are in accordance with certain approved samples.

Q. Have you ever seen the requirement for inspection certificate in this particular form before, in your experience in the banking business? A. Not to my knowledge.

Q. When the first documents, the first set of documents—

The Court: What was that question?

Mr. Choate: I am saying that the language in which the inspection certicate is required is that the inspection certificate certify that the goods are in [42] conformity with the order. He has never seen that form of words used before, in his experience.

The Court: In the inspection certificate?

Mr. Choate: In the bill of lading.

The Court: What are those words?

Mr. Choate: They are in the amendment to the letter of credit.

The Court: Show it to me. What I am wondering about now is where Mr. Norton agreed to have that phrase put in there if he had never seen it before in any other letter of credit.

Mr. Choate: It is a very unusual requirement.

The Court: Who required it?

Q. Can you tell us how that particular language came to be in the amendment to the letter of credit? A. This amendment was requested by our customer, Robert Lawrence.